MOTION FILED

JAN 5 1976

No. 75-122

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
Petitioner,
v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE MICHIGAN UTILITIES GROUP

HOWARD J. TRIENENS
THEODORE N. MILLER
C. JOHN BURESH
Counsel for the Michigan utilities group

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

January 5, 1976

No. 75-122

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
Petitioner,
v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes a group of Michigan utilities, consisting of Michigan Bell Telephone Company, Michigan Consolidated Gas Company, Michigan Gas Utilities Company and Michigan Power Company, and, pursuant to Rule 42 of the Rules of this Court, moves for an order permitting it to file a brief herein as *amicus curiae*. In support of its motion, the Michigan utilities group respectfully states as follows:

1. The Michigan utilities group consists of public utilities providing utility services to the people of the State of Michigan.

Michigan Bell Telephone Company provides telecommunications services; Michigan Consolidated Gas Company and Michigan Gas Utilities Company provide gas services; Michigan Power Company provides electric power and gas services. Each of these utility companies is subject to the regulatory jurisdiction of the Michigan Public Service Commission.

2. Petitioner has raised a question in this case which affects all public utilities, including particularly the Michigan utilities group and other public utilities operating in the State of Michigan. Michigan's public utility regulation, like that of other States, is based upon a recognition that competition does not protect the public interest in certain industries, and that comprehensive regulation must be substituted for competition if the public interest is to be served. Under Michigan law, as elsewhere, public utilities are required to conduct their businesses in accordance with this public interest standard. The federal antitrust laws, on the other hand, are based upon a unidimensional competition standard. Thus, application of the federal antitrust laws to the activities involved here—activities of a regulated public utility subject to the jurisdiction of and approved by a state public utility commission—would place all public utilities in a position in which they may be faced with duplicative and inconsistent standards of conduct. This would not only be inherently unfair to regulated utilities but would frustrate effective implementation of the public interest standard by the States.

3. In view of the importance of the question presented in this case, the Michigan utilities group sought the consent of petitioner and respondent to file its brief *amicus curiae.* While respondent indicated its willingness to consent, petitioner declined to do so. Hence, the group files this motion for leave to present its views on this question which it believes may not be fully or adequately presented by the parties. Respondent is naturally concerned with the defense of the particular tariff provision involved in this case. The possibility exists, therefore,

that respondent may not adequately deal with the more general question of the applicability of the federal antitrust laws to activities of public utilities resulting from and subject to regulation by a state public utility commission. This possibility is heightened by the fact that the particular tariff provision attacked by petitioner may be virtually *sui generis,* having been abandoned by most States. In these circumstances, respondent may feel compelled to devote a large part of its brief to an explanation of the merits of such a tariff provision, even though that question is not itself before the Court.

4. The Michigan utilities represented herein have an interest in this case that reflects the interest of all regulated public utilities, particularly utilities operating in Michigan, but also including utilities operating under similar regulatory jurisdiction in other States. The group is therefore in an ideal position to present a brief as *amicus curiae* dealing with the broad implications of the question presented.

For these reasons, the Michigan utilities represented herein request leave to file their brief as *amicus curiae* at or before the time set for the filing of the brief of the respondent herein.

Respectfully submitted,

HOWARD J. TRIENENS
THEODORE N. MILLER
C. JOHN BURESH
Counsel for the Michigan utilities group

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

January 5, 1976

No. 75-122

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
Petitioner,
v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MICHIGAN UTILITIES GROUP AS AMICUS CURIAE

HOWARD J. TRIENENS
THEODORE N. MILLER
C. JOHN BURESH
Counsel for the Michigan utilities group

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

January 5, 1976

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Question Presented	3
Statement	4
Summary of Argument	5
Argument	12
Conclusion	39

INDEX OF AUTHORITIES

Cases:

	Page
American Tel. & Tel. Co. v. *FCC,* 487 F. 2d 865 (2d Cir. 1973)	24
Asheville Tobacco Board of Trade, Inc. v. *FTC,* 263 F.2d 502 (4th Cir. 1959)	8, 26
Business Aides, Inc. v. *Chesapeake & Potomac Tel. Co. of Va.,* 480 F.2d 754 (4th Cir. 1973)	8, 26
Continental Ore Co. v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962)	9, 27, 34-35
Crancer v. *Lowden,* 315 U.S. 631 (1942)	29
Day-Brite Lighting, Inc. v. *Missouri,* 342 U.S. 421 (1952)	38
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961)	32
FCC v. *RCA Communications, Inc.,* 346 U.S. 86 (1953)	21-22
Federal Crop Ins. Corp. v. *Merrill,* 332 U.S. 380 (1947)	7, 23
Ferguson v. *Skrupa,* 372 U.S. 726 (1963)	6, 15
Gas Light Co. of Columbus v. *Georgia Power Co.,* 440 F.2d 1135 (5th Cir. 1971)	8, 26
Goldfarb v. *Virginia State Bar,* 421 U.S. 773 (1975)	8, 27-28
Gordon v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975)	7, 9, 16-17, 18-19, 25, 33, 37

	Page
Hecht v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971)	8, 26
Huron Portland Cement Co. v. *Michigan Public Service Commission*, 351 Mich. 255, 88 N.W.2d 492 (1958)	21
Indiana & Michigan Electric Co. v. *Miller*, 19 Mich. App. 16, 172 N.W.2d 223 (1969)	21
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)	9, 27, 30-32
Jeffrey v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129 (5th Cir. 1975)	8, 27
Keogh v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922)	29
Ladue Local Lines, Inc. v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970)	8, 26
Lamb Enterprises, Inc. v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972)	8, 26
Los Angeles Gas & Electric Corp. v. *Railroad Commission of California*, 289 U.S. 287 (1933)	9, 31
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939)	29
Lucas v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973)	9, 30
Marnell v. *United Parcel Service*, 260 F. Supp. 391 (N.D. Cal. 1966)	35
Missouri Pacific R. Co. v. *Norwood*, 283 U.S. 249 (1931)	6, 14
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	29
Munn v. *Illinois*, 94 U.S. 113 (1877)	36
Nebbia v. *New York*, 291 U.S. 502 (1934)	6, 12, 15, 20
New Mexico v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974)	8, 26
New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932)	21

	Page
New York State Dept. of Social Services v. *Dublino*, 413 U.S. 405 (1973)	6, 14
Norman's on the Waterfront, Inc. v. *Wheatley*, 444 F.2d 1011 (3d Cir. 1971)	8, 26, 29
Olsen v. *Smith*, 195 U.S. 332 (1904)	6, 16, 38
Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U.S. 329 (1951)	6, 15
Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324 (1950), *aff'd*, 341 U.S. 329 (1951)	2, 5, 21
Parker v. *Brown*, 317 U.S. 341 (1943)	*passim*
Reid v. *Colorado*, 187 U.S. 137 (1902)	6, 14
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	8, 27, 29-30
Secretary v. *Central Roig Refining Co.*, 338 U.S. 604 (1950)	23
Travelers Insurance Co. v. *Blue Cross of Western Pa.*, 298 F. Supp. 1109 (W.D. Pa. 1969)	35
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	24
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	32
United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975)	7, 17-18, 25
United States v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Cal.), *cert. dismissed*, 414 U.S. 801 (1973)	35
United States v. *S.C.R.A.P.*, 412 U.S. 669 (1973)	24
Washington Gas Light Co. v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971)	8, 26
Western Union Telegraph Co. v. *Esteve Brothers & Co.*, 256 U.S. 566 (1921)	20
Whitten v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970)	8, 25-26, 35

Federal Statutes:

	Page
Communications Act of 1934, 47 U.S.C. § 203	24
Federal Aviation Act, 49 U.S.C. § 1373	24
Federal Power Act, 16 U.S.C. § 824d	24
Interstate Commerce Act, 49 U.S.C.	
§ 6	24
§ 317	24
§ 318	24
§ 906	24
Natural Gas Act, 15 U.S.C. § 717c	24
Shipping Act of 1916, 46 U.S.C. § 817	24

State Statutes:

	Page
Michigan Compiled Laws	
§ 460.551	33
§ 460.552	4, 34
§ 460.557	4, 34

Miscellaneous:

	Page
Hale, *De Portibus Maris* (1776)	36
Smith, *Wealth of Nations* (1776)	36

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
Petitioner,
v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MICHIGAN UTILITIES GROUP AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Michigan utilities group consists of public utilities providing utility services to the people of the State of Michigan pursuant to Michigan law which establishes a comprehensive regulatory scheme administered by the Michigan Public Service Commission. Michigan Bell Telephone Company provides

telecommunications services; Michigan Consolidated Gas Company and Michigan Gas Utilities Company provide gas services; Michigan Power Company provides electric power and gas services. For all purposes here relevant, the laws and regulatory authority under which these utilities operate are identical to those under which the respondent Detroit Edison operates.

The regulation of public utilities in Michigan is predicated upon the theory that unrestricted competition does not adequately serve the public interest with respect to utility services. Consequently, Michigan has enacted a comprehensive statutory scheme which substitutes regulation for competition in these industries and vests the Michigan Public Service Commission with the responsibility for such regulation. The Michigan Commission is expressly empowered, among numerous other things, to control entry, prices and the terms and conditions of services rendered in utility industries.

The standard to be applied by the Michigan Commission in regulating public utilities is not the standard of free and open competition but a public interest standard based upon the concept of public convenience and necessity. The Michigan Supreme Court has held that "The right to exclude . . . competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W.2d 324, 330 (1950), *aff'd,* 341 U.S. 329 (1951).

As companies regulated under a public interest standard, public utilities in Michigan have an affirmative duty to seek out and serve the public convenience and necessity. Under the Michigan regulatory scheme, public utilities may initiate rate and tariff proposals subject to the overriding authority of the Michigan Commission to approve, reject or modify any such proposals. However, this initiative is exercised subject to the

same statutory standard under which these public utilities are regulated. Hence, all public utilities are obligated to follow the public interest standard—that is, to make such rate and tariff proposals as they believe will serve the public convenience and necessity—even if the rates and tariffs proposed might have an adverse effect upon competition.

No one has ever attacked the tariff provision challenged here as inconsistent with the public interest standard under which it was proposed by respondent and approved by the Commission. Instead, the theory advanced in this case is that respondent's tariffs can be attacked, the enforcement of such tariffs enjoined, and respondent held liable for treble damages—all wholly independent of the public convenience and necessity of the State of Michigan—if such tariffs fail simultaneously to satisfy the competition standard of the federal antitrust laws.

Such a theory, if accepted by this Court, would radically alter existing systems of public utility regulation, make it impossible for public utilities to serve the public interest, and impose substantial financial harm upon many utilities by exposing them to massive treble damage suits. The Michigan utilities group represented herein is deeply concerned with each of these possible consequences. Its interest here is to help persuade the Court that such consequences can and should be avoided, since the theory upon which this case is brought is demonstrably unsound and contrary to the settled line of decisions of this Court.

QUESTION PRESENTED

Whether the activities of a public utility within the framework of a comprehensive state regulatory scheme are subject to the antitrust laws even though that regulatory scheme is based upon a deliberate state policy to substitute regulation for competition in public utility industries?

STATEMENT

The Michigan Public Service Commission approved tariffs submitted to it by respondent Detroit Edison which include in the rates for basic electric service the cost of providing light bulbs to its customers (App. 215a). The approved tariffs are expressly conditioned upon Detroit Edison's providing light bulbs "without extra charge" (App. 214a). Michigan law provides that Detroit Edison must submit tariffs containing all rates, terms and conditions of service to the Commission before it can offer service to the public (Michigan Compiled Laws § 460.552) and further provides that once tariffs are approved and permitted to go into effect, they must be observed by all concerned—both the utility and its customers (M.C.L. § 460.557).

The essential complaint of petitioner here is that in complying with these provisions of Michigan law, respondent has caused him competitive injury. Petitioner did not complain of any injury to the Michigan Commission, but sought instead to obtain an injunction and treble damages under the federal antitrust laws.

Both the district court and the court of appeals below rejected this claim. Relying upon this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), the district court held that the federal antitrust laws have no application to the "service rendered" by respondent pursuant to its tariffs (App. 59a):

> "[I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.
>
> "It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the 'rates,' 'services' and 'operation' of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the 'service rendered' in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine."

The Court of Appeals for the Sixth Circuit affirmed the district court's decision, expressly approving the holding "that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)" (App. 62a).

SUMMARY OF ARGUMENT

The decision of this Court in *Parker* v. *Brown* reaffirmed the power of the States to substitute regulation for competition where deemed necessary in the public interest and held that the federal antitrust laws do not apply to conduct resulting from and subject to such regulation. Contrary to the contentions of petitioner and the United States as *amicus curiae*, the tariff provision involved in this case is a part of a regulatory scheme enacted by the State of Michigan pursuant to and reflecting precisely this kind of policy determination. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324 (1950), *aff'd*, 341 U.S. 329 (1951). Hence, this case falls squarely within the principles established in *Parker* v. *Brown*.

Parker v. *Brown* rests upon two principles that are vital in the regulation of public utilities: first, that the federal courts should respect the power of the States to substitute regulation for competition in businesses within their respective borders where, in the judgment of the State involved, unrestricted competition will not serve the public interest; and, second, that

businesses regulated in the public interest should not be subjected to the inconsistent standard of the federal antitrust laws with respect to the very matters that the State has determined should not be left to unrestricted competition.

The first of these principles is one of broad application which has been reflected not only in the decisions of this Court involving attacks upon state regulation based upon the federal antitrust laws, but also upon other federal laws. See, *e.g., Reid* v. *Colorado,* 187 U.S. 137, 148 (1902); *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249, 256 (1931); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413-414 (1973). The principle even extends to cases involving attacks upon state regulation based upon such constitutional provisions as the Due Process Clause and the Commerce Clause. In a long line of cases, this Court has recognized that the Due Process Clause neither restricts the power of the States to regulate nor imposes any particular economic theory upon state regulation. See, *e.g., Nebbia* v. *New York,* 291 U.S. 502 (1934); *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963), and cases cited therein. Similarly, the Court has held that the Commerce Clause does not prevent the States from substituting regulation in the public interest for competition in public utility industries which are essentially local. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951). The principles applied in these cases are directly related to the principles underlying *Parker* v. *Brown,* as the Court itself expressly recognized in a decision shortly after the Sherman Act was passed. *Olsen* v. *Smith,* 195 U.S. 332 (1904).

The respect for the States' power to regulate reflected in all of these decisions is necessarily tied to the second principle underlying *Parker*—that as to matters with respect to which the States have substituted regulation for competition, regulated companies should not be subjected to the inconsistent standards of the federal antitrust laws. Common sense, as well as the most elemental considerations of fairness, demand no less, since a company regulated under a public interest standard that subordinates competition to other public interest considerations cannot be expected simultaneously to serve two masters.

This Court has itself recognized the necessity of protecting regulated companies from duplicative and inconsistent standards where federal regulation is involved. *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975). The principle relied upon in these cases has equal application where state public utility regulation is involved. Although the States have no power to authorize or expressly to immunize antitrust violations, they do have the power under *Parker* to remove activities from the scope of the federal antitrust laws by subjecting them to comprehensive regulation under a standard inconsistent with that of unrestricted competition. When the States exercise that power, the same considerations apply that led the Court in *Gordon* and *NASD* to protect federally regulated companies from duplicative and inconsistent standards. Indeed, as the United States itself argued as *amicus curiae* in *Gordon,* public utility regulation constitutes an *a fortiori* situation for application of this principle.

Both petitioner and the United States contend that *Parker* applies only where every step and detail of the state regulatory scheme involved is "required" or "compelled" (Pet. Brief, p. 15, U.S. Brief, p. 9). There is no merit to this contention. Indeed, such a rule would essentially nullify *Parker* since it is not practical for any regulatory agency to prescribe in advance absolute rules to govern "the multitudinous details" of vast and complex industries. *Cf. Federal Crop. Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947). Regulation by its very nature must remain flexible and leave room for some initiative in the regulated enterprises themselves—subject always to the controlling regulatory statutes—if regulation is not to stifle the very industries seen to be most affected with the public interest. Yet the preservation of this private initiative in no way alters the fact that the State has concluded that regulation under a public interest standard, not unrestricted competition, is required by the public convenience and necessity in those industries. The

application of *Parker* v. *Brown* depends upon this basic policy conclusion, backed by the power of the State acting "as sovereign" (317 U.S. at 352), not upon any requirement that the State prescribe each and every detail of a regulatory program to the exclusion of private initiative.

The decisions of the federal courts of appeals confirm this broad view of the scope of *Parker* v. *Brown*. *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 254 (4th Cir. 1971); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 368-369 (9th Cir. 1974); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131, 137 (8th Cir. 1970); *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959); *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1017 (3d Cir. 1971).

The courts of appeals have also recognized that state public utility regulation is "a classic example of the *Parker* v. *Brown* exemption." *Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129, 1134 (5th Cir. 1975). See also *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971); *Business Aides, Inc.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir), *cert. denied*, 409 U.S. 1001 (1972).

None of the decisions of this Court cited by petitioner or the United States supports a contrary view. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), involved a situation in which the State had not enacted any policy substituting regulation for competition with respect to the legal profession. Similarly, in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), the State had not substituted regulation for

competition, but rather had attempted simply to approve conduct that constituted a violation of the antitrust laws—an attempt which *Parker* itself expressly condemned. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), did not involve the problem of accommodating the federal antitrust laws to state regulation but arose instead under the quite different state action concept embodied in the Fourteenth Amendment—a concept that is totally irrelevant to the issues here. *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 n.35 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). Finally, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), involved a Canadian law designed to promote competition, not one designed to substitute regulation for competition in the public interest. Significantly, none of these cases involved efforts to impose antitrust liability on a public utility, nor did any of them even suggest that such liability could be imposed upon an industry comprehensively regulated according to a public interest standard.

Nor do these cases support the proposition urged by the United States that antitrust liability can be imposed upon comprehensively regulated public utilities simply because the state regulatory agency fails to hold formal proceedings in discharging its regulatory responsibilities. This Court has recognized that the nature of state regulatory proceedings is a matter for the State to determine so long as constitutional limitations are not transgressed. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California*, 289 U.S. 287 (1933). *Cf. Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689 n.13 (1975).

The cases relied upon by petitioner and the United States thus leave unimpaired the basic principle that state public utility regulation is inconsistent with any effort to impose federal antitrust liability for matters subject to such regulation. Public utility regulation clearly satisfies all of the requirements which such cases indicate to be encompassed within *Parker* v. *Brown*: such regulation plainly could not have been enacted in

the absence of an affirmative state policy; and equally plainly, state public utility regulation has implicit in it all of the compulsory powers that the States can bring to bear. In these circumstances, the proper approach—and, indeed, the only approach that rightly gives effect to the power of the States to determine their own regulatory policies—is for this Court to follow *Parker* and expressly to reaffirm the principle that a state policy of comprehensive public utility regulation precludes the application of the federal antitrust laws.

The preservation of the principles underlying *Parker* v. *Brown* is important generally to the States and to industries regulated under state law, but it is particularly important—indeed vital—with respect to public utility regulation, which by definition involves a comprehensive scheme of regulation under a standard different from, and inconsistent with, the competition standard of the antitrust laws. Although competition is an important part of our system of law and economics, it is not now and never has been the only legally established method of assuring that economic resources yield public benefits.

The petitioner here has completely disregarded the basic rationale of public utility regulation, just as he has disregarded the Michigan Public Service Commission—the very agency set up by that State to protect the public interest in matters relating to public utility industries. In this situation, even if the Court were to feel that a question of local law might have been improperly resolved here, it should affirm the judgment below without prejudice to petitioner's raising the question before the Michigan Commission and obtaining a definitive resolution in accordance with the Michigan law. It is plain that petitioner's aim is to convert a regulatory matter into an antitrust claim in the hope of realizing a treble damage recovery—a result which might well cause the federal courts to be deluged with matters that could and should be resolved by state regulatory authorities, subject of course to judicial review.

The United States' decision to support petitioner as *amicus curiae* only reflects the effort of the Antitrust Division of the Department of Justice to impose its concept of competition upon all of American industry, whether regulated or unregulated. This runs flatly counter to the decisions of this Court respecting the power of the States to substitute regulation for competition where deemed necessary to serve the public interest within their respective borders. The Antitrust Division would have this Court, under the guise of the Sherman Act, reassume the very role which the Court properly disclaimed when it rejected the substantive due process philosophy in vogue prior to *Nebbia*.

The Court should reject such efforts to return it to the role of a superlegislature. The Court's decision in *Parker* v. *Brown* properly construes the Sherman Act in recognition of the long history of coexistence in our legal system of the competing values of competition and regulation, the importance under our laws of the constitutional principle of federalism, and the vital necessity of keeping antitrust standards requiring unrestricted competition out of the sphere of comprehensive regulation, if such regulation is to be workable and fair to all concerned.

ARGUMENT

In *Nebbia* v. *New York,* 291 U.S. 502 (1934), this Court upheld a law of the State of New York avowedly designed to eliminate "unrestricted competition" in the sale of milk in that State (291 U.S. at 538) by establishing "a Milk Control Board with power, among other things, to 'fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold' " (291 U.S. at 515). In upholding this statute, the Court rejected the contention that the States lack power to limit competition within their borders, saying (291 U.S. at 529, 538):

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. . . .
>
> * * * * *
>
> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside . . . ."

The *Nebbia* case was decided under the Due Process Clause and did not involve a direct attack upon state regulation under the federal antitrust laws. However, nine years later, such an attack did come before the Court in *Parker* v. *Brown,* 317 U.S. 341 (1943), a case remarkably similar to *Nebbia* except that it involved a state restriction upon competition in the marketing of raisins instead of milk. *Parker* arose out of the California Agricultural Prorate Act, an Act characterized by this

Court as authorizing "the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers" (317 U.S. at 346). In rejecting the contention that such an Act was inconsistent with the federal antitrust laws, the Court again upheld the power of the States to substitute regulation for competition where unrestricted competition is deemed to be contrary to the public interest.

The Court's holding in *Parker* made it clear that the federal antitrust laws could not be used to take the place of pre-*Nebbia* interpretations of the Due Process Clause (317 U.S. at 352):

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin* v. *Wallace,* 306 U.S. 1, 16; *Hampton & Co.* v. *United States,* 276 U.S. 394, 407; *Wickard* v. *Filburn, ante,* p. lll.
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith,* 195 U.S. 332, 344-45, cf. *Lowenstein* v. *Evans,* 69 F. 908, 910."

The *Parker* decision rests upon two basic principles: first, that the federal courts should respect the power of the States to substitute regulation for competition in any business within their respective borders where, in the judgment of the State involved, unrestricted competition will not serve the public interest; and second, that businesses regulated in the public interest should not be subjected to the inconsistent standards of the federal antitrust laws with respect to the very matters which the State has determined are not to be left to the kind of unrestricted competition that the antitrust laws were designed to promote in unregulated industries. The preservation of these principles is important generally to the States and to industries regulated under state law, but it is particularly important—indeed vital—with respect to public utility regulation, which by definition involves a comprehensive scheme of regulation that substitutes the public interest standard for the unrestricted competition standard of the antitrust laws with respect to the conduct of those businesses.

The first basic principle of *Parker* derives from the fundamental structure of the American system of government and reflects nothing more nor less than a due regard for the role of the States in that federal system. In this respect, *Parker* represents one aspect of a much broader line of decisions of this Court which have recognized that the power of the States to restrict competition and regulate local businesses in the public interest is not limited by generalized federal laws. See, *e.g.*, *Reid* v. *Colorado,* 187 U.S. 137, 148 (1902); *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249, 256 (1931); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413-414 (1973).

The same principle underlies many of this Court's constitutional decisions. As the Court is well aware, attacks upon state regulatory schemes restricting competition based upon the Due Process Clause were common and often successful in the early part of this century. However, since the repudiation of this basis for limiting state regulatory powers in the 1934

decision in *Nebbia* v. *New York,* the Court has consistently refused to compel the States to adhere to notions of a purely competitive economy under the Due Process Clause. The history of many of the decisions both before and after *Nebbia* is set forth in this Court's decision in *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). In that case, the Court expressly rejected the theory that state regulatory statutes must conform to a particular economic theory and held instead that the States are entitled to follow their own views of economics in regulating businesses within their borders (372 U.S. at 732).

The Court's refusal to limit the power of the States to regulate businesses in the public interest under the Due Process Clause has been parallelled by a consistent recognition that the Commerce Clause should not be used to accomplish the same result indirectly, at least where the businesses involved are essentially local. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), the Court rejected an attack upon state regulation under the Commerce Clause in a case arising under the very regulatory statutes that are in issue in this case. *Panhandle Eastern* involved an effort by an interstate gas pipeline company to sell its gas directly to large industrial customers in Michigan without obtaining a certificate of convenience and necessity from the Michigan Public Service Commission. As the Court viewed the case, it presented a direct conflict between an asserted federal right to engage in unrestricted competition and the State's power to prevent such competition in the public interest (341 U.S. at 334):

> "Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated."

The Court rejected the claimed federal right and upheld the power of Michigan to substitute regulation for competition—a power the Court described as a "vital interest to the State of Michigan" (*id.*).

The need reflected in *Parker* v. *Brown* to respect the power of the States to substitute regulation for competition is directly related both to *Nebbia* and to *Panhandle Eastern*. Indeed, in an early case applying this principle even before the decision in *Parker*, this Court itself recognized the relationship between efforts to limit state regulatory powers on constitutional grounds and attacks upon such powers under the Sherman Act. *Olsen* v. *Smith*, 195 U.S. 332 (1904). *Olsen* involved a state statute restricting competition in the provision of pilotage services which was attacked both on constitutional grounds, under the Commerce and Due Process Clauses, and on the basis of the then recently enacted Sherman Act. The Court treated the Sherman Act claim as essentially identical to the constitutional claim, pointing out that both claims rested upon a theory which "in its essence simply denies that pilotage is subject to governmental control" (195 U.S. at 344)—a theory which the Court firmly rejected (195 U.S. at 344-345). Thus, *Olsen* squarely holds that the power of the States to restrict competition in the public interest is no more limited by the Sherman Act than it is by the Commerce and Due Process Clauses of the Constitution itself.

The second principle of *Parker* v. *Brown*—that as to matters with respect to which the States have substituted regulation for competition, regulated companies should not be subjected to the inconsistent standards of the federal antitrust laws—is a necessary corollary of the first. Common sense, as well as the most elemental considerations of fairness, demand no less, since a company regulated by a public interest standard that subordinates competition to other public interest considerations cannot be expected simultaneously to serve two masters. This Court has itself recognized this fact in cases involving federal regulation. Thus, in two cases, decided only last Term, the Court held that the federal antitrust laws do not apply to activities subject to regulation under a standard different from and inconsistent with the standard of competition embodied in the antitrust laws.

In *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), the Court upheld dismissal of an antitrust claim based

upon the New York Stock Exchange's conduct in establishing fixed brokerage rates for transactions on the Exchange. Because this conduct was subject to the supervisory jurisdiction of and regulation by the Securities and Exchange Commission, the Court held it immune from attack under the antitrust laws, explaining its holding in terms of the fundamental inconsistency between the standard of competition embodied in the antitrust laws and the public interest standard upon which regulation is based (422 U.S. at 689-690):

> "If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. . . . [P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement the scheme."

On the same day, the Court handed down its decision in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), in which it upheld the dismissal of an antitrust attack upon certain practices subject to regulation by the SEC in connection with the sale and distribution of mutual fund shares. In the *NASD* case, the Court emphasized the pervasive regulatory scheme established by the federal securities acts governing these practices and held that "the Sherman Act has been displaced" by that regulatory scheme (422 U.S. at 734-735):

> ". . . we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. See *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973); *Pan American World*

> *Airways, Inc.* v. *United States,* 371 U.S. 296 (1963). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated."

Although the *Gordon* and *NASD* cases both involved a problem of accommodating the federal antitrust laws to *federal* regulation, the principle announced and applied in those cases is equally applicable where *state* regulation is involved. The Court found it unnecessary to address this fact directly in the *Parker* decision itself, since that case was brought not against the regulated companies involved, but against the officials charged with the responsibility of implementing the State's regulation. However, the problem of a regulated company faced with duplicative and inconsistent standards is certainly no less severe when one of those standards is established by state law than it is when both standards arise under federal laws. Indeed, in its brief in the *Gordon* case, the Antitrust Division of the Department of Justice, appearing as *amicus curiae,* took the position that certain state regulation—specifically, the comprehensive regulation of public utilities—presented a much stronger case for holding the federal antitrust laws inapplicable than did the SEC's jurisdiction to oversee the New York Stock Exchange (Brief of the United States in No. 74-304, October Term, 1974, at 35-36).

The Court rejected the argument advanced by the Antitrust Division in *Gordon.* In doing so, however, it only further emphasized the principle underlying *Parker* that the standard of competition embodied in the antitrust laws cannot be applied to activities regulated in the public interest—a principle that has its plainest application where public utility regulation is involved. Thus, in *Gordon,* the Court held that even in the absence of a comprehensive, public utility-like system of governmental regulation, antitrust immunity may be necessary to protect regulated companies from the unfairness inherent in

being compelled to march to two different drummers (422 U.S. at 688-689). Hence, both the arguments and the decision in *Gordon* make it plain that the principle applied in that case is one of general application which establishes *a fortiori* that the federal antitrust laws do not apply to conduct of a public utility that is regulated under a comprehensive regulatory scheme.

The determination in *Gordon* and *NASD* that Congress intended to immunize the activities involved there from the antitrust laws is fully applicable here, even though this case involves state public utility regulation. Although the Court in *Parker* pointed out that the States do not have the power simply to approve violations of the antitrust laws (317 U.S. at 351), *Parker* confirms the States' power to remove businesses from the scope of those laws by subjecting their activities to regulation under a standard inconsistent with the antitrust standard of competition. So long as a State establishes meaningful regulation designed to protect the public interest, it cannot be seen as simply sanctioning a violation of the antitrust laws. Hence, there is only one difference between the power of the States and that of Congress to remove activities from the scope of the antitrust laws—namely, unlike Congress, a State cannot confer express antitrust immunity. State immunity resulting from the *Parker* principle must always be implied and must, in order properly to be implied, be accompanied by meaningful state regulation designed to protect the public.[1]

---

[1] We agree with the position urged by the National Assocation of Regulatory Utility Commissioners in the brief it has submitted as *amicus curiae* here that the *Gordon-NASD* principles can be applied directly to state regulation of public utilities in view of the provisions of federal statutes incorporating such regulation as an integral part of congressional policy (NARUC Brief, pp. 28-33). The plan of these statutes further confirms the fact, recognized by the Court in *Parker,* that Congress never intended to limit the power of the States to regulate utilities in the public interest.

The present case represents an effort by petitioner, now supported by the United States as *amicus curiae,* sharply to cut back on the principle established in *Nebbia* and *Parker.* The light bulb replacement provision challenged here operates as a part of a comprehensive program established by the State of Michigan to regulate public utilities within that State. Indeed, this provision establishes a condition of service that is a part of the tariffs filed by respondent with the Michigan Public Service Commission and approved by that Commission to govern the rates at which respondent must provide and its customers must pay for electric service. As such, the light bulb replacement provision is an integral part of respondent's rates[2] and is no more subject to attack under the antitrust laws than the rates themselves.

The United States impliedly concedes that the light bulb replacement provision involved here was properly approved by the Michigan Commission, insofar as Michigan law is concerned. Nonetheless, it contends that the tariffs containing this provision can be attacked in a federal antitrust case on the theory that the State of Michigan has no affirmative policy that conflicts with such an application of the antitrust laws. This contention is stated as follows (U.S. Brief, pp. 10-11):

> ". . . the state has no special policy. There is no Michigan statute which either requires or favors the practice [of offering replacement bulbs as a part of the rate for electric service]. The Michigan legislature has never displayed any interest in the manner in which light bulbs are sold in the state. Similarly, the Michigan Public Utilities Commission *apparently* has no policy that either favors or opposes—let alone compels—the program. Indeed, that agency *apparently* has approved tariffs of other utilities that do not have a lamp exchange program (App. 51a)." (Emphasis supplied.)

---

[2] *Western Union Telegraph Co.* v. *Esteve Bros. & Co.,* 256 U.S. 566, 571 (1921).

The uncertain position expressed with respect to both the policies of the Michigan Public Service Commission and the significance of that Commission's rulings is critical here, since that position simply glides over the single most important fact in this case—that is, the fact that the State of Michigan has decided that unrestricted competition is not an appropriate state policy for public utilities and has delegated to the Michigan Commission the power to restrict competition with respect to matters related to such industries as necessary to serve the public interest.

In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W. 2d 324 (1950), *aff'd,* 341 U.S. 329 (1951), the Michigan Supreme Court defined the powers of the Michigan Commission precisely in this way (44 N.W. 2d at 330):

> "The right to exclude . . . competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission."[3]

---

[3] See also *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255, 88 N.W.2d 492, 499 (1958); *Indiana & Michigan Electric Co.* v. *Miller,* 19 Mich. App. 16, 172 N.W.2d 223, 226 (1969). In this respect, the policy of the State of Michigan is in no sense novel. Indeed, it is the same policy upon which all regulation of public utilities in this country is based—both state and federal—as recognized by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 282 (1932):

> "[U]nder certain circumstances free competition might be harmful to the community and . . . when it [is] so, absolute freedom to enter the business of one's choice should be denied."

In *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86 (1953), the Court speaking through Mr. Justice Frankfurter, emphasized this same policy as the basis for federal public utility regulation (346 U.S. at 92):

> "Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only

Hence, under Michigan law, the Commission is the *alter ego* of the legislature with plenary powers to implement the State's basic policy with respect to public utilities—that is, the policy that competitive considerations must give way "where the general public convenience and necessities so require."

In view of this definitive interpretation of Michigan law, it is almost incomprehensible that the United States can concede that the Michigan Commission has approved tariffs including bulb replacement provisions and has incorporated that approval in an order that these tariffs be published and adhered to and, at the same time, insist that "the program is not conducted pursuant to any affirmative state program or policy that requires it" (U.S. Brief, p. 12). Under Michigan law, the Commission's action in permitting the tariffs challenged here to become effective necessarily was based upon and reflects an implementation of the basic policy of the State of Michigan to the same extent as would be the case if the Michigan legislature itself had taken such action.[4] Once that action is taken, the tariffs themselves have the effect of law and become an affirmative part of the policy of the State.

---

those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office . . . and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation."

[4] The United States' reference to the fact that the Commission "apparently has approved tariffs of other utilities that do not have a lamp exchange program" (U.S. Brief, p. 11) does not add to this contention. Indeed, this fact reinforces, rather than detracts from, the conclusion that the orders of the Michigan Public Service Commission reflect a basic state policy. The consistency of a light bulb program with the public convenience and necessity may properly be determined, not upon some generalized notion gleaned from average conditions throughout a State, but upon a careful evaluation of the facts and circumstances existing in each locality. Hence, the action of the Michigan Commission in limiting the light bulb replacement provisions to certain metropolitan areas only seems to confirm the conclusion that the Commission is discharging the responsibility placed upon it by the basic policy embodied in Michigan law—that is, the responsibility of insuring that the public convenience and necessity is served in all areas of the State by all public utilities operating within its borders.

Petitioner and the United States also contend that the principle established in *Nebbia* and *Parker* is not applicable here because Michigan's regulatory statutes permit public utilities to initiate tariffs subject only to approval by the regulatory commission, thus leaving the utility to that extent free to exercise its own private discretion. Essentially, their contention is that *Parker* v. *Brown* applies only where every step and detail of the state regulatory scheme involved is "required" or "compelled" by the State (Pet. Brief, p. 15; U.S. Brief, p. 9). There is no merit to this contention. Indeed, such a contention, if accepted, would essentially nullify the *Parker* principle, particularly as that principle applies to public utility regulation.

No statute regulating public utilities, state or federal, subjects every step and detail of the regulatory scheme to governmental compulsion. The very purpose of regulation is to provide a flexible and expert approach to problems too complicated for detailed resolution by a legislative body. *Secretary* v. *Central Roig Refining Co.*, 338 U.S. 604, 610 (1950). A regulatory agency can no more act solely through preannounced, compulsory rules and regulations that "define the multitudinous details appropriate" for regulation of vast and complex industries than could a legislative body itself. *Cf. Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). For this reason, public utility commissions must, if they wish to discharge their responsibility to regulate in the public interest, allow for some utility initiative in the formulation of proposals for tariffs and other regulatory activities, and this is invariably

the form that statutes regulating public utilities take. Indeed, initiative permitted utilities under Michigan law—a feature emphasized here by petitioner and the United States as making the antitrust laws applicable to activities subject to regulation by the Michigan Commission—is present in every state regulatory statute.[5]

The initiative of a public utility under a comprehensive regulatory scheme is no more subject to the federal antitrust laws than conduct resulting directly from an order of a regulatory commission. Since the purpose of public utility regulation is to protect the public interest rather than any private interests, be they those of the utility or those of the utility's would-be competitors, the overriding obligation of a utility is to serve this governing standard. The utility must therefore exercise any initial discretion left to it under the regulatory

[5] Similar provisions permitting utility initiative in rate-making subject to regulatory control are also present in the federal statutes that regulate public utilities. Thus, federal statutes typically provide that the regulated company shall file a tariff or schedule of rates, terms or conditions of service with the agency which shall automatically become effective after a prescribed notice period unless suspended, rejected or modified by the agency. See, *e.g.*, 16 U.S.C. § 824d (Federal Power Act), 15 U.S.C. § 717c (Natural Gas Act), 49 U.S.C. §§6, 317, 318, 906 (Interstate Commerce Act), 47 U.S.C. §§ 203 (Communications Act of 1934), 49 U.S.C. § 1373 (Federal Aviation Act), 46 U.S.C. § 817 (Shipping Act of 1916). The role of the regulated company in initiating changes in rates and services under these statutes has been consistently recognized by this Court and the courts of appeals. See, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, 487 F. 2d 865, 880 (2d Cir. 1973) ("In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions."); *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 672 (1973) ("Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads."); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956) ("all rates [under the Natural Gas Act] are established initially by the natural gas companies").

scheme in accordance with the public interest standard, even though the result may be that a tariff it proposes to serve the public interest may have adverse consequences to would-be competitors. The regulatory commission, of course, has the ultimate power to determine whether the public interest is truly served by such a tariff; but the federal antitrust laws cannot properly be applied to the utility's conduct in proposing the tariff, either before it becomes effective or afterwards. To hold otherwise would subject the utility's conduct to a standard that under state law it was not and could not properly have been designed to satisfy. A plainer example of the imposition of "duplicative and inconsistent standards" contrary to the principles of this Court's decisions in *Gordon* and *NASD* could hardly be imagined.

Thus, the presence of such private initiative cannot and does not render conduct subject to comprehensive public utility regulation liable to prosecution under the federal antitrust laws. Indeed, this is apparent from the *Parker* decision itself, since the agricultural program involved in that case, although enforced by state officials, also involved the activities of numerous private parties, who, subject to the ultimate power of the State to approve and control the program, were given substantial initiative and discretion. Indeed, as the Court pointed out, a "program committee" composed of private producers formulated and administered the program subject to approval by state officials (317 U.S. at 346-347). Nonetheless, the Court held that since the activities involved were subject to regulation by California under this program, the federal antitrust laws were inapplicable.

The decisions of the federal courts of appeals reinforce the conclusion that the applicability of the principle of *Parker* v. *Brown* does not depend upon the existence of compulsion in every step and detail of a state regulatory program. A widely cited case setting forth the scope of the *Parker* v. *Brown* principle is *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25

(1st Cir.), *cert. denied*, 400 U.S. 850 (1970). There, the court described *Parker* as follows (424 F.2d at 30):

> "Our reading of *Parker* convinces us that valid government action confers antitrust immunity ... when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."

The *Whitten* court did not state, or even suggest, that the "alternate form of public regulation" provided must contain compulsion as to every step and detail of such regulation. Quite the contrary, the court expressly recognized that state "delegation and approval [of the kind involved] in *Parker*" (424 F.2d at 31) is sufficient to render the federal antitrust laws inapplicable.

Whitten has been quoted, cited or paraphrased by every court of appeals that has dealt with *Parker* since that decision. See, *e.g.*, *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 254 (4th Cir. 1971); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 368-369 (9th Cir. 1974); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131, 137 (8th Cir. 1970); *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1017 (3d Cir. 1971). See also *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959).

Public utility regulation, by its very nature reflects a recognition that competition is not "the *summum bonum*" in any industry to which it is applied. Hence, the courts of appeals have consistently applied *Parker* v. *Brown* to cases involving utilities. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135, (5th Cir. 1971); *Business Aides, Inc.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001

(1972); *Jeffery* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129 (5th Cir. 1975). The Fifth Circuit's opinion in *Jeffrey* is particularly apposite here, for it expressly recognizes the precise principle which should control this case (518 F.2d at 1134):

> "Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker* v. *Brown* exemption."

All of these cases support the view that under *Parker* v. *Brown*, the federal antitrust laws have no application to the pervasively regulated conduct of a public utility. Moreover, none of the cases cited by petitioner or the United States supports a contrary view. Petitioner relies upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Schwegmann* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). The United States also relies upon *Goldfarb*, but in addition cites *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Significantly, none of these cases even involved the question of whether activities resulting from and subject to a comprehensive scheme of public utility-type regulation could be made the basis of a charge of violation of the federal antitrust laws. Nor do the cases, when analyzed, provide any basis for concluding that this Court has restricted *Parker* v. *Brown* so as to render it inapplicable to such activities.

In *Goldfarb*, this Court was confronted with the question of "whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates § 1 of the Sherman Act . . ." (421 U.S. at 775). The State of Virginia had not adopted a public utility-like regulatory scheme with respect to the legal profession and did not regulate the fees of lawyers. In rejecting the claim that *Parker* v. *Brown* conferred antitrust immunity upon such activities, the Court pointed out that the activities of the State Bar amounted to nothing more than "foster[ing] anticompetitive practices for the benefit of its members" (421 U.S. at 791). During the course of its discussion, the Court stated that in

order to be entitled to antitrust immunity "anticompetitive activities must be compelled by direction of the State acting as a sovereign" (*id*).

The Court in *Goldfarb* did not purport to overrule or limit *Parker* v. *Brown* in any way. Quite the contrary, the Court cited that case as the controlling precedent in its decision and pointed out that *Parker* v. *Brown* "held that an anticompetitive marketing program which 'derived its authority and its efficacy from the legislative command of the state' was not a violation of the Sherman Act . . ." (421 U.S. at 788). It is thus apparent that this Court in *Goldfarb* was not suggesting, as petitioner and the United States here contend, that *Parker* applies only where state compulsion applies to each step and detail of a state regulatory scheme. Rather, as is apparent from the approval of and reliance upon the language of *Parker,* the Court's holding in *Goldfarb* was that only those allegedly anticompetitive activities which are subject to regulation under a statutory scheme adopted and enforced by the State are entitled to federal antitrust immunity.

As pointed out above, this was the precise holding of *Parker* v. *Brown.* As such, this holding is plainly applicable in a situation such as that presented here where an antitrust complaint is specifically directed at the effective tariffs of a public utility. Although the tariffs may initially be filed by the public utility, "it is the state," to use the words of *Parker,* "acting through the Commission, which adopts the [regulatory] program and which enforces it with penal sanctions" (317 U.S. at 352). The public utility is compelled by law to observe its tariffs scrupulously so long as they are in effect, and it is prohibited by law from enforcing any tariff that has been declared to be unlawful by a public utility commission of competent jurisdiction.[6] As in *Parker,* these laws are generally backed by penal sanctions.

---

[6] This Court has itself repeatedly recognized in cases involving federally regulated utilities that public utility tariffs have the force of law, whether prescribed or merely accepted by the regulatory agency. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951); *Keogh* v. *Chicago & N.W. Ry. Co.,* 260 U.S. 156, 163 (1922); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516, 520 (1939); *Crancer* v. *Lowden,* 315 U.S. 631, 635-36 (1942). The same principle is recognized in Michigan in its regulation of electric utilities, as indeed it is generally recognized in all state regulation of public utilities. M.C.L. 460.557.

The *Schwegmann* case relied upon by petitioner is equally inapplicable here. Indeed, the *Schwegmann* case is an even more extreme example than *Goldfarb* of the precise situation envisioned by the Court in *Parker* when it pointed out (317 U.S. at 351):

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."

The state law involved in *Schwegmann* authorized private parties to enforce retail price maintenance agreements upon competitors who would not become parties to such agreements —a practice which the Court found to be a *per se* violation of the antitrust laws. As in *Goldfarb,* the state law did not purport to regulate either the prices of those involved in such price-fixing agreements or the rate of return that they might earn. Hence, the Court concluded in *Schwegmann,* as it concluded in *Goldfarb,* that the state involvement constituted at most an authorization for a private party to violate the federal antitrust laws without affording any protection to the public—the very power which *Parker* v. *Brown* expressly held to be beyond those properly remaining to the States.[7]

---

[7] This is precisely the ground upon which the Court of Appeals for the Third Circuit distinguished *Schwegmann* from *Parker* v. *Brown* in *Norman's on the Waterfront, Inc.* v. *Wheatley,* 444 F.2d 1011, 1016-1018 (1971).

Schwegmann plainly has no application to the situation in the case at bar. Both the rates and the rate of return of public utilities such as Detroit Edison are comprehensively regulated by state commissions in the public interest, as, indeed, is the right of utilities to provide service to the public and all terms and conditions of that service. Monopoly profits are impossible in such a situation, as is control over the market *vis-a-vis* any competitors the commission might permit to serve the utilities' customers. Significantly, neither petitioner nor the United States suggests that this case involves a situation in which state law is simply sponsoring anti-competitive practices.

The *Jackson* case relied upon by the United States is similarly inapposite to any issue involved in this case. As the Court of Appeals for the Seventh Circuit, sitting *en banc*, pointed out in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 n.35 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973), a case specifically noted by this Court in *Jackson*, (419 U.S. at 349 n.6), there is a basic difference between the state action standard applied under the Fourteenth Amendment and the question of antitrust immunity under *Parker* v. *Brown* based on a State's comprehensive public utility regulation.[8] Hence, the considerations that led the Court in *Jackson* to hold the Fourteenth Amendment's restrictions upon state action inapplicable to practices of a regulated utility "where the initiative [for such practices] comes from it and not from the State" (419 U.S. at 357) have nothing whatever to do with the applicability of the Sherman Act to activities subject to comprehensive public utility regulation. Indeed, if the issue involved in *Jackson* had been the same as that involved here, the Court could not have decided *Jackson* as it did without overruling *Parker* v *Brown*, since *Parker* itself involved a state program that rested upon private initiative.

---

[8] The directness of a State's involvement in a particular practice is an appropriate standard when determining whether the State has an obligation under the Fourteenth Amendment to accord a person affected by that practice a fair hearing. As the Court pointed out in *Jackson*, it may be a practical impossibility to provide hearings in all matters regulated by the State where the State itself is not directly involved (419 U.S. at 354-355). In such circumstances, the Court's holding that the existence of utility initiative places limits upon governmental responsibility under the Fourteenth Amendment is entirely sound. In the antitrust context, however, which brings into play a need to accommodate statutory schemes reflecting two different and inconsistent standards, the existence of ultimate authority and control in the State requires that the antitrust laws not be applied. Ultimate responsibility for the regulation of the industry involved is the key, and in this context that responsibility clearly rests with the State in its enforcement of the public interest standard of its regulatory statutes.

Moreover, the argument advanced here by the United States on the basis of *Jackson* should be rejected for the additional reason that it assumes powers and responsibilities in this Court which the Court repeatedly and deliberately has refused to assume. In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California*, 289 U.S. 287 (1933), the Court carefully delineated its proper role in reviewing quasi-legislative determinations such as utility rate-making (289 U.S. 304):

> "The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed."

In refusing to review the "process" by which the State of California had exercised its "legislative discretion" so long as "constitutional limitations are not transgressed," the Court announced a principle which ever since has consistently guided its review of state rate-making decisions.

The United States' argument that reliance upon utility initiative in the rate-making process renders state rate determinations susceptible to the federal antitrust laws would

effectively nullify the principle of *Los Angeles Gas.* Acceptance of such an argument would permit the federal courts to enjoin state rate-making orders—just as such an injunction is sought here—not on the ground that the order violates the Constitution, but merely because it might have anti-competitive consequences and the State has permitted private parties to propose the order before it was permitted to become effective by the state regulatory commission. With all due respect, this argument is absurd. It is no more the proper function of the federal courts to enjoin a tariff having the status of law under a state regulatory scheme because it was initiated by a private party than it is to enjoin a state law proposed by a private party, even if anti-competitive consequences ensue. Nor can the federal courts properly interfere with either process by punishing the private parties involved for making such proposal. *Cf., Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

The United States' argument based upon *Jackson* is thus unsound both because it is inconsistent with *Parker* v. *Brown* and because it would project this Court into an area in which it has previously determined that it has no proper concern—that is, the *process* by which legislative and quasi-legislative decisions are made by the States. The same considerations require the Court to reject petitioner's related argument that the State here has acted out of "ignorance" (Pet. Brief, p. 24). The Court cannot and should not indulge such an assumption in any case. It certainly should not do so where the record affirmatively shows that the Michigan Commission investigated the practice here under attack.[9]

---

[9] As the district court pointed out (App. 57a-58a), the Michigan Commission's specific attention to the light bulb plan is amply demonstrated by its treatment of Detroit Edison's request to modify the plan for commercial users in 1964. At that time, the Commission required Detroit Edison to submit information "on the direct costs of that plan" and, although no "formal hearing" was held (App. 57a-58a, 135a), it considered this information before ordering that "lamp replacements of approved burned out incandescent lamps will no longer be furnished under this rate schedule" (App. 336a).

Certainly, the fact that the Michigan Commission did not hold formal proceedings and issue an affirmative order expressly compelling Detroit Edison to institute and maintain the challenged light bulb program is of no significance here. In the *Gordon* case, this same argument was advanced with respect to the Securities and Exchange Commission's supervision of the New York Stock Exchange's fixed commission rate plan. In that case, the SEC pointed out in its *amicus curiae* brief that requiring formal hearings or orders as a prerequisite to giving full effect to the regulation would interfere with the regulatory agency's efficient functioning and might make it impossible for it properly to do its job, and this Court concluded that "immunity should not rest on the existence of a formal order" (422 U.S. at 689 n.13). The Court's holding in *Gordon* that no such formal proceedings and orders are necessary applies *a fortiori* to state public utility regulation. Surely, Congress did not intend by enactment of the Sherman Act to impose rigid procedural requirements upon the exercise of the public health and welfare power by state regulatory agencies, if, indeed, it could even constitutionally do so.[10]

---

[10] Petitioner is also plainly wrong in contending that the absence of such a proceeding violated state law (Pet. Brief, pp. 6-7, 12-13). Michigan law states only that the Michigan Public Service Commission has jurisdiction over the rates and "rules and conditions of service" of electric utilities (M.C.L. § 460.551), and that a utility may not put any rate into effect "without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or change" (§ 460.552). The law does *not* require the Michigan Public Service Commission to hold a hearing

Finally, *Continental Ore* provides no support whatever for the United States' argument that the principle of *Parker* v. *Brown* "applies only where the state compels the anticompetitive conduct and not where it merely authorizes or approves such conduct" (U.S. Brief, p. 8). The *Continental Ore* case involved an alleged conspiracy to monopolize the vanadium market through, among other means, the exclusion of Continental from the Canadian market. This exclusion was allegedly accomplished by a Canadian subsidiary of one of the conspirators which had been authorized by the wartime Canadian Metals Controller to purchase and allocate all vanadium required by Canadian industry. The decision of this Court that a conspiracy to monopolize this market under these circumstances was subject to the antitrust laws is in no way inconsistent with *Parker* v. *Brown* or any of the other cases cited and discussed above. Plainly, the Canadian law involved in *Continental Ore* was designed not to limit competition in vanadium but to allocate the available resources so as fairly to prorate the shortage that existed among all companies using those resources. Thus, the Court held (370 U.S. at 706):

---

or make a record of its deliberations in determining to grant such affirmative approval. Instead, the Public Service Commission is granted "power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder . . ." (§ 460.557). Administrative agencies such as the Michigan Public Service Commission regularly carry out much—if not the bulk—of their regulatory responsibilities in proceedings and deliberations of which transcripts are not made. Accordingly, the absence of a transcript or other similar record is no basis for a conclusion that the Michigan Public Service Commission has proceeded "in ignorance" (Pet. Brief, p. 24).

> "[T]here is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped."

The *Continental Ore* case is thus clearly distinguishable from this case which involves an industry in which Michigan law has decreed that regulation in the public interest, not competition, should be the governing standard. and one in which the Michigan Commission not only "would have approved" but did in fact approve the very practices involved here.[11]

---

[11] Nor do the lower federal court cases relied upon by the United States support its efforts to restrict the proper scope of the principle of *Parker* v. *Brown*. Indeed, the United States grossly misstates the *Whitten* case, commingling the question of the existence of an affirmative state policy with the question of compulsion in such a way as to create the impression that *Whitten* holds *Parker* v. *Brown* to be applicable only where the State has enacted a statute in which all private action involved is specifically compelled by state law. *Whitten* stands for no such doctrine. Quite the contrary, as discussed above, *Whitten* makes it plain that the Court of Appeals for the First Circuit understands *Parker* v. *Brown* to apply where a State displaces competition "and deliberately attempts to provide an alternate form of public regulation"—whether every single aspect of that regulation is compulsory or not. In that respect, *Whitten* does not reflect a "contrary view" (U.S. Brief, pp. 9-10, n.1) to that taken by the Fourth Circuit or any other court of appeals. With respect to the district court cases relied upon, the United States is only partially accurate in its citations. Thus, *United States* v. *Pacific Southwest Airlines,* 358 F. Supp. 1224, 1228-1229 (C.D. Cal.), *cert. dismissed,* 414 U.S. 801 (1973), quotes from and relies upon *Whitten* as setting forth "the underlying rationale" of *Parker* v. *Brown*. The other two district court decisions relied upon by the Government, *Travelers Insurance Co.* v. *Blue Cross of Western Pa.,* 298 F. Supp. 1109 (W.D. Pa. 1969), and *Marnell* v. *United Parcel Service,* 260 F. Supp. 391 (N.D. Cal. 1966) (U.S. Brief, p. 10), are correctly cited by the United States but both were decided before *Whitten* and court of appeals decisions consistent with *Whitten* in the Third and Ninth Circuits and thus do not reflect a controlling or correct understanding of the principle of *Parker* v. *Brown*.

A thorough review of the cases relied upon by petitioner and the United States thus leaves unimpaired the basic principle that state public utility regulation is inconsistent with any effort to impose federal antitrust liability for matters subject to such regulation. Public utility regulation clearly satisfies all of the requirements which these cases indicate to be encompassed within *Parker* v. *Brown:* such regulation plainly could not have been enacted in the absence of an affirmative state policy; and equally plainly, state public utility regulation has implicit in it all of the compulsory powers that the States can bring to bear. In these circumstances, the proper approach—and, indeed, the only approach that rightly gives effect to the power of the States to determine their own regulatory policies—is for this Court to follow *Parker* and expressly to reaffirm the principle that a state policy of comprehensive public utility regulation precludes the application of the federal antitrust laws.

The preservation of the power of the States to enact comprehensive public utility regulation is critical. Important as the principle of competition is in American economic life, it is not now, and never has been, the only legally established method of assuring that economic resources yield public benefits. The historical antecedents of the modern regulation of public utilities can be traced far back into history—to the medieval doctrine of the "just price," and the pervasive controls of the mercantilist state. By the time that the concept of competition came to be regarded in Anglo-American thought as a regulator of price, quality and the efficient allocation of resources (see Adam Smith, *Wealth of Nations* (1776)), the concept of businesses "affected with a public interest" and thereby subject to regulation was also firmly established in the common law. See Lord Hale, *De Portibus Maris* (written prior to 1676, published in 1776), quoted in *Munn* v. *Illinois,* 94 U.S. 113, 125-126 (1877).

The petitioner in this case has simply ignored the distinction between industries in which unrestricted competition is

appropriate and those in which such competition has been determined to be contrary to the public interest. Indeed, petitioner did not even bother to challenge Detroit Edison's plan before the Michigan Public Service Commission—a fact which we submit reveals more plainly than anything said in his brief the true nature and purpose of this case.[12] Petitioner is not interested in determining whether Detroit Edison's plan serves the public interest of the people of Michigan. Instead, it is quite apparent that his principal concern is to convert an obvious regulatory matter into an antitrust matter in an effort to recover treble damages under the antitrust laws.[13] In this respect, the case is not different from *Gordon* and countless others that have been filed in recent years. We submit that if this trend is encouraged, the courts will be flooded with litigation and the regulatory process will be essentially stultified.

That the United States as *amicus curiae* has seen fit to support petitioner does not alter these conclusions. The brief of the United States apparently reflects the view of the Antitrust Division of the Department of Justice that unrestricted com-

---

[12] This fact alone should be sufficient to dispose of most of petitioner's contentions in this case. For, even if this Court should feel that there are questions of local law involved here that may have been decided improperly, it should affirm the judgment below without prejudice to the petitioner's raising those questions before the Michigan Public Service Commission. In that way, the questions could be resolved in the proper fashion under Michigan law by the tribunals best equipped to resolve them, with a right to appeal ultimately to the Supreme Court of Michigan by anyone dissatisfied with that resolution. Unless and until the responsible Michigan authorities decide that the provision of light bulbs should be separated from the public utility services of electric utilities in Michigan, this Court should not upset the long standing practice of that State.

[13] Counsel for petitioner virtually admitted as much in the argument before the district court when pressed by the trial judge as to the reason for petitioner's failure to proceed before the Michigan Public Service Commission (App. 174a-175a).

petition is the only economic theory permissible in this country.[14] This view has led the Antitrust Division, as well as many plaintiffs, to treat the federal antitrust laws as though they are constitutional provisions and, on that basis, to ask the courts to overturn regulatory laws on the theory that they limit competition. We submit that this effort is both improper and unsound, since it would inevitably transform this Court into a "superlegislature to weigh the wisdom of legislation" (*Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 423 (1952))—the very role which this Court disclaimed when it rejected the substantive due process philosophy. Yet that is the role which the Antitrust Division would force back upon the court by its position in this case.

This Court should make it plain that efforts to exalt the antitrust laws above state and federal regulatory statutes will not be permitted to succeed. As this Court pointed out more than seventy years ago in upholding the state regulation involved in *Olsen* v. *Smith* (195 U.S. at 345):

> "When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

This case thus raises issues that are far more important than the Michigan light bulb plan that is here being attacked. The Court's decision in *Parker* v. *Brown* recognizes the long

---

[14] See, *e.g.*, testimony of Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division before the Subcommittee on Antitrust Monopoly Senate Judiciary Committee on S. 2028, presented on December 10, 1975.

history of coexistence in our legal system of the competing values of competition and regulation, the importance under our laws of the constitutional principle of federalism, and the vital necessity of keeping antitrust standards based upon the notion of unrestricted competition out of any sphere of comprehensive regulation if such regulation is to be workable and fair to all concerned. The Court should reaffirm this decision in unmistakable terms.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

HOWARD J. TRIENENS
THEODORE N. MILLER
C. JOHN BURESH
Counsel for the Michigan utilities group

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400
January 5, 1976